Supreme Court, U.S.

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No. 98-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

IN RE CLARENCE MURPHY,

Petitioner

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

QUESTION I

Whether the U.S. District Court lacked **Article 3, §2** subject matter jurisdiction under the **11TH Amendment of the U.S. Constitution** and was required by the ***Huffman*** **Abstention Doctrine** to abstain from hearing Planned Parenthood's Appeal of the Bettendorf City Council's zoning determination. See ***Huffman et al. v. Pursue Ltd.***, 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200 (1975); ***Middlesex County v. Board of State Bar Examiners***, 457 U.S. 423, 73 L.Ed.2d 116, 102 S.Ct. 2515 (1982); and ***Ohio Civil Rights Commission v. Dayton Schools***, 477 U.S. 619 at 627 fn. 2; 91 L.Ed.2d. 512 at 522 fn. 2; 106 S.Ct. 2718 (1986) and ***Plough v. West Des Moines Community School District***, 70 F.3d 512 at 516-517 (CA 8TH 1995) (extending the ***Huffman*** **Abstention Doctrine** to State Administrative proceedings in which important generic quasi-judicial interests are vindicated)?

QUESTION II

Whether Planned Parenthood's Civil Rights Complaint has pleaded subject matter jurisdiction under **Article 3, §2 of the U.S. Constitution** and a right to a federal remedy in the U.S. District Court under the **Civil Rights Act**, where Clarence Murphy has "vested property rights" in the existing PUD Zoning on the Planned Parenthood property under the **Iowa Constitution**, because Murphy's property lies within 200 feet of the Planned Parenthood parcel and, where Murphy and other adjacent real estate owners had, one year earlier, exercised a successful "protest" under **§24.4** of the **Bettendorf Zoning Code**, which changed the 4-3 majority required for a zoning change to a 6-1 super-majority requirement, and defeated Planned Parenthood's request for change of Zone from PUD to C-5, and where the Injunction Judgment of U.S. District Court Judge Charles R. Wolle, if allowed to stand, will extinguish the "vested PUD property rights" of Murphy and other protesting owners of adjacent property in violation of the **11TH**

Amendment and without Due Process of Law as guaranteed by Iowa and the **U.S. Constitution**?

QUESTION III

Whether the **11TH Amendment** and the **Res Judicata Doctrine** expressed in ***Plough v. West Des Moines Community School District***, 70 F.3d 512 at 516-517 (CA 8TH 1995), precluded Planned Parenthood from withdrawing from the Iowa State Judicial System, and seeking judicial relief from the U.S. District Court, pursuant to its **Article 3, §2** federal subject matter jurisdiction; where Planned Parenthood voluntarily submitted itself to the Jurisdiction of the State of Iowa and Home Rule Authority of the City of Bettendorf for the purpose of obtaining vested rights in C-5 Zoning, which had jurisdiction of the subject matter at the time the Bettendorf City Council made quasi-judicial fact findings, which functioned both as the basis for its legislative decision (denying the Zone change) and for a judicial appeal to the Iowa District Court?

QUESTION IV

Whether, under the ***Rooker-Feldman*** **Abstention Doctrine**, the U.S. District Court lacks subject matter jurisdiction under **Article 3, §2 of the U.S. Constitution** of Planned Parenthood's Judicial Appeal from the City Council's quasi-judicial fact finding determination made one year earlier which, because of the rights inherent in and arising out of the mandate of the **11TH Amendment** limitation, must be filed and heard in the Iowa Judicial System for the benefit of Murphy, as a citizen of Iowa, as a Sovereign State, and the Home Rule City of Bettendorf, whose citizens had, one year earlier, waged a successful "protest" under **§24.4** of the **Bettendorf Zoning Ordinance**, in support of such "vested rights" under the **Iowa Constitution**?

QUESTION V

Whether Planned Parenthood has failed to meet its burden of proof under ***Allen v. McCurry***, 449 U.S. 90 , 60

L.Ed. 2d 308, 101 S.Ct. 441 (1980) and ***Parratt v. Taylor***, 451 U.S. 527, 68 L.Ed.2d 420, 101 S.Ct. 1908 (1981), to establish that the U.S. District Court has subject matter jurisdiction of a legally sufficient **42 U.S.C. §1983** cause of action under **Article 3, §2 of the U.S. Federal Constitution**, where: (1) it is implicit and; as such, must be judicially noticed that by virtue of such allegations, Planned Parenthood has also stated a cause of action and remedy which is available against Bettendorf, a Home Rule City, in the Iowa District Court by writ of certiorari pursuant to ***Montgomery v. Bremer County Board of Supervisors***, 299 N.W.2d 687 at 692 (Iowa Supreme Court 1980), as a part of the zoning procedures available under the **Bettendorf Zoning Ordinance**; and the Iowa District Court and the Iowa Judicial System stood ready to hear Planned Parenthood's judicial appeal and all legal and constitutional challenges, and the Iowa Judiciary was and is able to render the same relief in the State Court under the **Bettendorf Zoning Ordinance**; and (2) the rights inherent in and arising out of the **11TH Amendment** have not been waived by either the City of Bettendorf or by Clarence Murphy, and mandate that the judicial appeal involving Iowa's generic interest in the integrity of the Iowa Zoning procedure and proceedings must be filed and heard in the Iowa State Court, for the benefit of the citizens of Bettendorf, as a Home Rule City in the Sovereign State of Iowa?

QUESTION VI

Whether the Order of U.S. District Judge Charles R. Wolle, dated February 12, 1998, which rezoned Planned Parenthood's real property from PUD zone to C-5 zone, constituted an unconstitutional legislative act which was in excess of the Court's judicial powers [1] and violated the

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[1] See **Proposition of Law I** at page 36, citing **Point III** of the recent opinion of the U.S. Supreme Court in ***Steel Co. v. Citizens for a Better Environment***, ___ U.S. ___, 140 L.Ed.2d 210, ___ S.Ct. ___ (March 4, 1998).

Doctrine of Separation of Powers of the U.S. Constitution, and is subject to correction by an extraordinary Writ of Mandate and/or Prohibition; where, presumptively, a zone change involves a Legislative Act and quasi-judicial acts of discretion by the seven (7) individual City Council persons; and the record fails to establish that the Bettendorf City Council's actions in denying the zone change had become "ministerial" in form at the time of such Order (which is a necessary finding and "condition precedent" to such an order)?

QUESTION VII

Whether Judge Charles R. Wolle's conduct (improper rulings) in the three ***Planned Parenthood*** cases establishes bias in favor of Planned Parenthood and a duty to recuse himself in such cases?

QUESTION VIII

Whether Clarence Murphy's Complaint in Intervention is timely under the circumstances of this case and the law expressed in ***Chiglo v. City of Preston***, 104 F.3d 185 (8TH Cir. 1997) and ***Meek v. Metropolitan Dade County***, 985 F.2d 1471 (11TH Cir. 1993), where Clarence Murphy's dissatisfaction is with the unfavorable mind set of the trial judge and his rulings on subject matter jurisdiction (which, if incorrect, are subject to correction by a writ of mandamus) rather than the presumption of adequate representation of his rights by the Bettendorf City Attorney. See in this regard, the letter delivered to the City Attorney and City Council on April 3, 1998 and Clarence Murphy's dissatisfaction with the City's failure to appeal, where Clarence Murphy's Complaint in Intervention was filed within a week after the City of Bettendorf disclosed its intentions not to appeal the twelve (12) propositions of law expressed in Clarence Murphy's April 3, 1998 letter delivered to the City Attorney and City Council?

QUESTION IX

Whether Murphy and the adjoining property owners

within 200 feet of the Planned Parenthood Zoning Change Application, who executed a successful "protest" under §24.4 of the **Bettendorf Zoning Code**, and defeated the Planned Parenthood Zoning Change Application (which, under the U.S. District Court Order was not approved by a super-majority 3/4 vote of the City Council) have "standing" to intervene upon appeal and, require that the Federal action be dismissed for (1) lack of **Article 3, §2** subject matter jurisdiction under the **11TH Amendment**; (2) for the failure of Planned Parenthood and the City of Bettendorf to inform the Court of the "vested property rights" of said adjoining property owners and that each was a "necessary party" by virtue of the successful "protest" of the Application of Planned Parenthood for a Zone Change from PUD Zone to C-5 Zone, pursuant to §24.4 of the **Bettendorf Zoning Code**; and (3) that if such a cause of action were to be pursued by Planned Parenthood, it must be filed and tried in the State Court as a State action pursuant to the mandate of the **11TH Amendment**, where the State of Iowa Judiciary routinely hears and decides such judicial appeals from the denial of a zone change and all constitutional challenges regarding the "public morals" of the State of Iowa and the Home Rule City of Bettenforf; and stood ready to do so in this case?

QUESTION X

Whether Clarence Murphy possesses a cognizable interest in the subject matter of the litigation for the purpose of Intervention; to determine whether the U.S. District Court below is empowered to rezone the Planned Parenthood property from PUD Zone to C-5 Zone, where Clarence Murphy, being the owner of a parcel of land within the 200 foot proscription of §24.3 and §24.4 of the **Bettendorf Zoning Ordinance**, has, as a citizen of Iowa, a "vested property right" to participate in a "statutory protest" and prevent the C-5 rezoning of the Planned Parenthood Zone Change Application, which "statutory protest" was exercised and did, in fact invoke the **20% Rule** of §24.3 and §24.4 of the **Bettendorf Zoning Ordinance** so as to now require a super majority vote of six members of the City Council

to effect the requested zone change and did, in fact, proximately cause the defeat of the Planned Parenthood Zone Change Application for C-5 Zoning on March 19, 1996 and this Court's attempt to rezone such property to C-5 Zoning?

QUESTION XI

Whether Clarence Murphy's cognizable interest, as a citizen of Iowa and as a citizen of the United States, will suffer injury as a result of the U.S. District Court's Final Judgment, where Clarence Murphy's "vested property right to protest" as a citizen of Iowa will be totally defeated without due process of law under the Iowa State Constitution and the United States Constitution if Clarence Murphy is not permitted to appeal the Federal Court's erroneous judgment, where the Bettendorf City Council's quasi-judicial fact finding on March 19, 1997 that such zone change from PUD Zone to C-5 Zone should not be granted and should be denied for lawful reasons, was not appealed by Planned Parenthood in the State of Iowa Judicial System as is authorized in ***Board of Supervisors Carroll County v. Chicago & Northwestern Transportation Co.***, 260 N.W.2d 813 (Iowa 1977); ***Iowa Department of Natural Resourses v. Shelley***, 512 N.W.2d 579 (Iowa App. 1993), and required by the **11TH Amendment** to the **Federal Constitution** which reads:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State",

and is now res judicata under Iowa law and is a final judgment as to which this Federal Court must give full faith and credit and recognition under the Rule of Law expressed in ***University of Tennessee v. Elliott***, 478 U.S. 788, 799, 92 L.Ed.2d 635, 106 S.Ct. 3220 (1986); ***Migra v. Warren City School Dist. Bd. of Ed.***, 465 U.S. 75, 77 n.1, 79 L.Ed.2d 56, 104 S.Ct. 892, 894 n.2

(1984) and in ***Plough v. West Des Moines Community School District***, 70 F.3d 512 at 517 (CA 8TH 1995), in which U.S. District Court Judge Charles R. Wolle sat as the ***Plough*** trial Judge?

QUESTION XII

Whether Clarence Murphy's cognizable interest has been adequately protected by the Defendant City of Bettendorf which heretofore had been acting on Clarence Murphy's behalf as the parens patria in the Federal Civil Rights lawsuit. See ***Motion to Intervene*** at "Issues on Appeal" at paragraph 19(a) through 19(l) **(#52, PA 403-409, v.3)** and ***Memorandum in Support of Motion to Intervene*** at pages 4 through 6 **(#56, PA 485-488, v.3)** citing ***Chiglo v. City of Preston***, 104 F.3d 185-189 (8TH Cir. 1997); ***Meek v. Metropolitan Dade County***, 985 F.2d 1471, 1478 n.2 (11TH Cir. 1993) and ***Yniguez v. State of Arizona***, 939 F.2d 727, 730, 737 (9TH Cir. 1991), reversed by a unanimous U.S. Supreme Court in ***Arizonans for Official English and Robert D. Park, Petitioners, v. Arizona***, 520 U.S. ___ (March 3, 1997). See, also, the above described April 3, 1998 confidential letter to Bettendorf City Attorney Greg Jager **(#58, PA 498-501, v.3)**.

QUESTION XIII

Whether the U.S. District Court's conclusion of law that, because a woman has a "privacy" right to an abortion, she must also have a corresponding "public right" to an abortion clinic in each local neighborhood in the City of Bettendorf is erroneous in that it denigrates the Sovereign Right of the State of Iowa and the City of Bettendorf, acting as a Home Rule City, to declare through its zoning process (procedure and proceedings) what the "public morals" of the City of Bettendorf and State of Iowa shall be with respect to the "abortion" issue, and the manner in which the State of Iowa and City of Bettendorf shall treat the land use in the City of Bettendorf and State of Iowa with respect to the number and location of abortion clinics which are to be constructed within its

jurisdiction; and whether the recent decision of U.S. District Judge Charles E. Wolle in ***Planned Parenthood of Greater Iowa v. Atchinson***, 126 F.3d 1042 (8TH Cir. Sept. 25, 1997) which prevented the State of Iowa Judiciary from adopting a State court interpretation requiring that Planned Parenthood be subjected to the **Certificate of Need (C.O.N.) Statute** review process, prior to beginning a new abortion service, was in error because of its failure to follow the U.S. Supreme Court **Abstention Rule** expressed in ***Watson v. Buck***, 313 U.S. 387, 61 S.Ct. 962 (1941) and has no binding effect in this case (see discussion in ***Steffel v. Thompson***, 415 U.S. 452, 39 L.Ed.2d 505 at p. 521 and 523 fn.3, 94 S.Ct. 1209 [1974] at pages 11, 20, 45, 63 fn.7, infra)?

QUESTION XIV

Whether the Judgment of U.S. District Court Judge Wolle, filed on February 12, 1998, must be reversed because it improperly explored, and is improperly predicated upon the subjective intent of the Members of the Bettendorf City Council with respect to their actions while legislating, which consideration is foreclosed by rudimentary zoning law and by the unanimous decision of the U.S. Supreme Court in ***Bogan et al. v. Scott-Harris***, No. 96-1569, ___ U.S. ___, filed on March 3, 1998?

QUESTION XV

Whether Planned Parenthood's repetitious use of the jurisdiction of the Federal District Court for trial of subject matter which should have been filed and heard in the Iowa State Court as required by the **11TH Amendment**, justifies a finding and determination that such repeated and improper use of attorneys fees pursuant to **42 U.S.C. §1988** is improper and must be discontinued and is subject to sanctions where it is intended as judicial blackmail; i.e., as a means of depriving the Iowa State Trial and Appellate System of its Sovereign Right to rule on important State matters?

QUESTION XVI

Whether the City of Bettendorf, Iowa deprived Clarence Murphy of procedural due process in failing to advise U.S. District Court Judge Wolle that the Planned Parenthood Complaint neglected to inform the Court that the "vested property rights" of Murphy which attended his successful "protest" were not before the U.S. District Court and, therefore, any judgment of that Court would not bind any of the Protesters who were absent, and whether the City of Bettendorf had a duty to appeal U.S. District Court Judge Wolle's February 12, 1998 Judgment which wrongfully divested Clarence Murphy of his "vested property rights" which attended the successful "protest" and attached to the land which was owned by Murphy, namely that: "Such Amendment shall not become effective except by the favorable vote of at least three-fourths (3/4) of all members of council" **Bettendorf Zoning Code at §24.4** (Our Emphasis.)?

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No. 98-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

IN RE CLARENCE MURPHY,

Petitioner

PETITION FOR WRIT OF CERTIORARI

OPINIONS AND ORDERS

A copy of the Orders of the U.S. District Court, the 8TH Circuit Court of Appeals below, and the U.S. Supreme Court appears at **Appendix A** to this ***Petition for Writ of Certiorari***.

On the dates below, U.S. District Judge Charles R. Wolle rendered the following decisions which are being appealed:

March 17, 1998: **Order** of U.S. District Judge Charles R. Wolle, modifying his February 24, 1998 ***Order*** **(#45, PA 370, v.2)** in part and denying the rest of Defendant's ***Motion to Reconsider Findings of Fact and Injunction*** **(#43, PA 365, v.2)** and reserving the right

to expand his Findings of Fact at the time he rules on the Plaintiff's application for attorneys fees. See **#47 PA 375, V.2**. (Our emphasis.)

April 21, 1998: **Order** of U.S. District Judge Charles R. Wolle, granting the motion to file an over length brief, and denying the ***Motion to Intervene*** **(#52, PA 392, v.3)** and all other motions as moot: ***Intervener's Motion for Expedited Ruling on His Motion to Intervene, or in the Alternative, an Extension of Time Within Which a Notice of Appeal May be Filed From This Court's Order*** **(#51, PA 386, v.3)**, and ***Motion to Dismiss for Lack of Subject Matter Jurisdiction*** **(#53, PA 447, v.3)** of Clarence Murphy. See **#57 PA 490, V.3**. (Our emphasis.)

May 11, 1998: **Order** of U.S. District Judge Charles R. Wolle, denying the ***Amended Motion to Reconsider and to Dismiss for Lack of Subject Matter Jurisdiction and Pursuant to the Doctrine of Res Judicata; Request for Oral Argument Pursuant to Local Rule 14(c) on Issue of Res Judicata as Applied by this Court in Plough v. West Des Moines Community School District, 70 F.3d 512 (CA 8TH 1995)***, by Clarence Murphy. See **#65 PA 542, V.3**. (Our emphasis.)

June 1, 1998: **Order** of U.S. District Judge Charles R. Wolle, denying the ***Renewed Request for Oral Argument Pursuant to Local Rule 14(c) and Good Cause Shown on Issues of Intervention, Res Judicata and Lack of Subject Matter Jurisdiction*** **(#68, PA 548, v.3)** by Clarence Murphy. See **#70 PA 559, V.3**.

RE JURISDICTION

Petitioner seeks review pursuant to **U.S. Supreme Court Rules 10(a)** and **10(c)** on the grounds that the 8TH Circuit

Court of Appeals: (1) has so far departed from the accepted and usual course of judicial proceedings; to wit, ignoring an **11TH Amendment** Constitutional violation and violations of the ***Huffman*** **Abstention Doctrine**, the ***Rooker-Feldman*** **Abstention Doctrine**, and the **Res Judicata** and **Stare Decisis Doctrines**; and (2) has sanctioned such a departure by a lower court as to call for an exercise of this Court's supervisory power; to wit, it has sanctioned Judge Wolle's Injunction Order (see **footnote 2** on page 10) which has enjoined the City of Bettendorf from enforcing its zoning ordinances, including the **Bettendorf "Protest" Ordinance**, **(Zoning Code §24.4)**, against the Planned Parenthood property, a judicial act which, prior to 1976, required the empowerment of a 3 Judge court pursuant to **28 U.S.C. §2281** (repealed). The U.S. District Court and the 8TH Circuit Court of Appeals have decided an important federal question in a way that conflicts with relevant decisions of this Court on the **11TH Amendment**; to wit, the ***Huffman*** **Abstention Doctrine**, ***Huffman v. Pursue Ltd.***, 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200 (1975), the ***Rooker-Feldman*** **Abstention Doctrine** and the **Res Judicata** and **Stare Decisis Doctrines**.

STATEMENT OF THE CASE

Planned Parenthood wishes to construct a clinic in Bettendorf, Iowa, which will cater to the abortion trade. The **Bettendorf Zoning Ordinance** allows abortion clinics on property in a C-5 Zone.

Had Planned Parenthood purchased a C-5 Zoned property, it would not have had a zoning problem. Instead, it chose to purchase a property in a PUD Zone (which was surrounded by and within 200 feet of three relatively new residential apartment complexes) and submitted an application for a Zone Change by ordinance to C-5.

The adjacent apartment owners objected and made a successful statutory protest (**20% Rule**) against the zone change (being within 200 feet of the Planned Parenthood property),

pursuant to **Bettendorf Zoning Code, §24.2 and §24.4**, which precluded the Bettendorf City Council from adopting a C-5 Zoning Ordinance unless the City Council voted 6-1 for the zone change. The City Council aligned itself with the protesters and on March 19, 1996 voted 5-1 not to adopt the C-5 Zoning Ordinance.

Zoning Rights are "Vested Rights" under Iowa Law and the Iowa Constitution. The 8TH Circuit Court of Appeals has so held in its decision in ***Nemmers v. City of Dubuque, Iowa***, 716 F.2d 1194 (1983).

Under Iowa case law, a city council's action on a zone change request is broadly defined to be a "judicial function" which can be appealed by writ of certiorari to the Iowa District Courts, see ***Montgomery v. Bremer County Board of Supervisors***, 299 N.W.2d 687 at 692 (Iowa Supreme Court 1980). If such an appeal is not filed within 30 days, the city council's actions become final, in which case, under the **11TH Amendment** and ***Huffman v. Pursue Ltd.***, 420 U.S. 592 at 606, fn. 18 and 19 and the progeny of ***Huffman*** (***University of Tennessee v. Elliott***, 478 U.S. 788, 92 L.Ed.2d 635, 106 S.Ct. 3220 [1986], and ***Migra v. Warren City School Dist. Bd. of Ed.***, 465 U.S. 75, 79 L.Ed.2d 56, 104 S.Ct. 892 [1984], and ***Plough v. West Des Moines Community School District***, 70 F.3d 512 at 516-517 [CA 8TH 1995]), the city council's quasi-judicial order becomes final and **Res Judicata**.

On March 21, 1997, One year and two days after the City Council's denial of the Zone Change, Planned Parenthood filed a Civil Rights Action under **42 U.S.C. §1983** in the U.S. District Court (**#1, PA 1, v.1**) (pleading what is, in essence, an appeal from the Bettendorf City Council's quasi-judicial Order denying the C-5 Zone Application) but did not name the adjacent apartment owners who made the successful statutory protest as defendants or the Iowa Ordinance being attacked.

The City of Bettendorf filed a Motion for a Partial Summary Judgment, pursuant to the **11TH Amendment** and the **Res Judicata Doctrine** (**#21, PA 119, v.1**). U.S. District Judge Charles R. Wolle (erroneously) denied the City's **Res Judicata**

Plea (**#32, PA 181, v.1**).

Upon conclusion of the federal trial, Judge Wolle entered a judgment which purported to rezone the property to C-5 Zoning (**#42, PA 364, v.2**,) and enjoined the enforcement of the **Bettendorf Zoning Ordinance** with respect to the Planned Parenthood property, which judicial act, prior to 1976, required a 3 Judge Court under **28 U.S.C. §2281** (repealed), see **footnote 2** on page 10, infra.

Petitioner Murphy timely moved to intervene, (immediately after the City of Bettendorf announced its decision not to pursue an appeal), for the purpose of appealing U.S. District Judge Wolle's Judgement on **11TH Amendment** jurisdictional and other grounds, including his denial of Bettendorf's Summary Judgment Motion on a plea of **Res Judicata**.

U.S. District Judge Wolle ruled (cursorily) on Petitioner Murphy's extensive pleadings: (1) that the Intervention Motion was "untimely", (2) refused to address the merits of Petitioner's right to mandatory intervention, and the **11TH Amendment** Jurisdictional and Res Judicata issues raised by Murphy at the time of Murphy's ***Intervention Motion***, and (3) further refused to set such matters for oral argument.

In the Court of Appeals below, Petitioner Murphy sought judicial relief from Judge Wolle's arrogation of Federal Judicial Power in two separate forms: by the filing of a direct appeal and by the filing of a verified complaint in an original Petition for Writ of Mandamus in the 8TH Circuit Court of Appeals, pursuant to **28 U.S.C. §1651(a)**.

In a highly unorthodox ruling, the Court treated the ***Appellant's Opening Brief*** of Petitioner on the direct appeal and Petitioner's original petition for a prerogative writ of mandamus as though they had been consolidated, and, in a brief single order, denied the petition for Writ of Mandamus without an opinion, and summarily affirmed Judge Wolle's Judgment, also without opinion. The Court of Appeals thereafter also denied a petition for rehearing and suggestion of a hearing en banc in each of the two cases.

Petitioner Murphy seeks to have Judge Wolle's Judgment vacated on the ground that the Federal District Court lacked **Article 3, §2** subject matter jurisdiction under the **11TH Amendment**, and the U.S. Supreme Court's ***Huffman*** **Abstention Doctrine**, ***Rooker-Feldman*** **Abstention Doctrine**, **Res Judicata Doctrine**, and the **Stare Decisis Doctrine**.

Petitioner Murphy contends in this ***Petition for Writ of Certiorari***, that the **11TH Amendment** and the **Doctrines** of **Res Judicata** and **Stare Decisis** control this litigation and that he is entitled to a **Rule Nisi** pursuant to **28 U.S.C. §1651(a)** correcting the refusal of both Courts to address the issue of "lack of subject matter jurisdiction" of the Federal Courts under the **11TH Amendment** claim. See ***Steel Co. v. Citizens for a Better Environment***, infra, at **Point III** (duty to address the question of subject matter jurisdiction as the first order of business, and on its own motion, if the parties to the lawsuit do not bring the matter to the trial court's attention); ***Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.***, 121 L.Ed.2d 605 at 610, 506 U.S. 139 (1993) (creating a new Rule of Court re the issue "lack of subject matter jurisdiction"); ***Wisconsin Dept. of Corrections v. Schacht***, 524 U.S. ___, 141 L.Ed.2d 364 at 375-378 (June 22, 1998) (Associate Justice Kennedy's concurring opinion re the issue of "lack of subject matter jurisdiction"). See ***Kerr v. U.S. Dist. Ct.***, 426 U.S. 394, 48 L.Ed.2d 725 (1976); ***Will v. U.S.***, 389 U.S. 90, 19 L.Ed.2d 305 (1967); and **Supreme Court Practice**, *7TH Ed.*, ***Stern, Gressman, Shapiro, Geller*** at page 495.

REASONS FOR GRANTING THE WRIT

I

THE FIRST AND FUNDAMENTAL QUESTION ON THIS APPEAL IS WHETHER THE U.S. DISTRICT COURT LACKS ARTICLE 3, §2 SUBJECT MATTER JURISDICTION PURSUANT TO BETTENDORF'S 11TH AMENDMENT CLAIM.

This appeal of ***Planned Parenthood v. Clarence***

Murphy, U.S.D.C. No. 3-97-CV-80056, is before this Court (on a **Rule 12** Petition for Writ of Certiorari) in two forms: (1) a direct appeal in ***Planned Parenthood v. Clarence Murphy***, and (2) in a separate Petition for a Writ of Mandamus in ***In Re Murphy***, claiming lack of subject matter jurisdiction [1]. In both cases, the first and fundamental question is that of federal subject matter jurisdiction under **Article 3, §2**, of the U.S. District Court below, from which the record comes. See the principle of law recently laid down by the U.S. Supreme Court in its opinion in ***Steel Co. v. Citizens for a Better Environment***, ___ U.S. ___, 140 L.Ed.2d 210, ___ S.Ct. ___(March 4, 1998)

II

THE BETTENDORF CITY COUNCIL QUASI-JUDICIAL FACT FINDING ON MARCH 19, 1997 WAS NOT APPEALED BY PLANNED PARENTHOOD AND IS NOW FINAL. THE RES JUDICATA DOCTRINE PRECLUDED THE U.S. DISTRICT COURT FROM RE-EXAMINING THE CITY COUNCIL'S DETERMINATION.

Planned Parenthood's appropriate remedy, for the City Council's alleged illegal act in rejecting the Zone Change Application of Planned Parenthood (Vision), was to timely file a petition for writ of certiorari in the Iowa State Courts. Not having done so, the decision of the Bettendorf City Council became a final adjudication and claim preclusion and the **Res Judicata Doctrine** prevents Planned Parenthood from now litigating those issues in the U.S. District Court. See ***Plough v. West Des Moines Community School District***, 70 F.3d 512 at 517 (CA 8TH 1995).

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[1] In addition, on January 22, 1999, Petitioner Murphy filed a ***Petition for Writ of Mandamus Pursuant to 28 U.S.C. §1651(A)***, invoking this Court's Original Jurisdiction, and an ***Application for Leave of Court to File a Petition, etc., in Excess of Applicable Page Limit***.

Iowa Code §414 vests municipalities with the authority to adopt zoning regulations and thereby restrict the use of land. Governmental power to pass land use restrictions is primarily a legislative function. **Iowa Land Use and Zoning Law**, *Vestal*, 1979, **§5.04**.

Iowa Rule of Civil Procedure 306, provides:

> "A writ of certiorari shall only be granted when specifically authorized by statute; or where an inferior tribunal, board or officer, exercising judicial functions, is alleged to have exceeded its, or his proper jurisdiction or otherwise acted illegally." (Our emphasis.)

Denying a zoning request is a judicial function for certiorari purposes under the broad definition adopted by Iowa Courts wherein judicial function includes cases where the challenged action takes place after required notice and opportunity to be heard. See ***City of Grimes v. Polk County Board of Supervisors***, 495 N.W.2d 751 (Iowa 1993); ***Montgomery v. Bremer County Board of Supervisors***, 299 N.W.2d 687 (Iowa 1980); ***Curtis v. Board of Supervisors***, 270 N.W.2d 447 (Iowa 1978). See, also, ***Boomhower v. Cerro Gordo County Board of Adjustment***, 163 N.W.2d 75 (Iowa 1968) at page 77, where the Court held:

> "Amendment of a zoning ordinance is a legislative function placed in the board of supervisors. . . . Parties who claim such ordinance or amendment thereto is arbitrary or capricious should seek relief in the courts by petitioning for a writ of certiorari." (Our emphasis.)

It is uncontroverted that in the instant case, public hearings, preceded by notice, were held, by both the Planning and Zoning (P & Z) Commission and the Bettendorf City Council, prior to the City Council's rejection of the Zone Change Application of Planned Parenthood (Vision). The action of the City Council on a zone change is clearly a judicial

function under Iowa law. Planned Parenthood was required to petition for a writ of certiorari in the Iowa Appellate Court pursuant to the **11TH Amendment**.

Planned Parenthood did not, and can not, contend the zoning ordinance at issue in the rezoning request in March of 1996 is unconstitutional on its face or that exhaustion of its state remedies would be futile. Planned Parenthood's allegations are only that the Bettendorf City Council's action was arbitrary and capricious and unconstitutional as applied to them.

Planned Parenthood is not only not excused from pursuing its state court remedies (see ***Southern Pacific Transportation Co. v. City of Los Angeles***, 922 F.2d 498 [9TH Cir. 1990] and ***Matter of City of Ames***, 219 N.W.2d 718 [Iowa 1974]), the **11TH Amendment** mandates that the Iowa State judicial procedures be followed.

Iowa Rule of Civil Procedure 319 provides that a petition for writ of certiorari must be filed "within thirty days from the time the tribunal, board or officer exceeded its jurisdiction, or otherwise acted illegally." The action complained of occurred on March 19, 1996. It is uncontroverted that no petition for writ of certiorari was filed.

The decision of the Bettendorf City Council thereby became a final judgement and claim preclusion and the **Res Judicata Doctrine** prevents Planned Parenthood from litigating in the U.S. District Court any claims and issues relating to the March 19, 1996 decision of the Bettendorf City Council. See ***Board of Supervisors Carroll County v. Chicago & Northwestern Transportation Co.***, 260 N.W.2d 813 (Iowa 1977); ***Iowa Department of Natural Resourses v. Shelley***, 512 N.W.2d 579 (Iowa App. 1993). See, also, ***Plough v. West Des Moines Community School District***, 70 F.3d 512 at 517 (CA 8TH 1995).

In acting upon a zone change in a planned unit development, the city council engaged in a quasi-judicial fact finding process and determination. See ***City of Fairfield v. Superior Court***, 14 Cal.3d 768 at 772 fn.1 (1975). See, also, *McQuillin*, **Municipal Corporations §13.03c**— Judicial or

Quasi-Judicial Functions. Under Iowa Law, such a quasi-judicial determination is final unless it is reversed upon an appeal within the Iowa Judicial System.

Because of the mandate of the **11TH Amendment**, such application for relief must be made to the Iowa District Court. It cannot be heard by the U.S. District Court, because the U.S. District Court lacks subject matter jurisdiction under **Article 3, §2 of the U.S. Constitution** and the ***Huffman* Abstention Doctrine**. The **11TH Amendment** provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or Equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State" (Our emphasis.)

Instead of appealing the Bettendorf City Council's quasi-judicial determination to the Iowa District Court, Planned Parenthood improperly filed its Civil Rights action on March 21, 1997 in the U.S. District Court. On June 19, 1997, Judge Wolle erroneously denied the City of Bettendorf's Motion to Dismiss for Lack of Subject Matter Jurisdiction (see ***Order*** at **#19, PA 115, v.1**), and on February 12, 1998, Judge Wolle filed his Judgment in this Civil Rights case (see **#41 and #42, PA 335-363, v.2**) [2/].

[2/] The Docket entry for February 12, 1998 (**see #1, PA at 10, v.1**) reads as follows:

> "2/12/98 77 Findings of Fact and Conclusions of Law ORDER by Chief Judge Charles R. Wolle terminating case Final Judgment is hereby entered for Plaintiff, Planned Parenthood of Greater Iowa, Inc., and against the Defendant, City of Bettendorf, IA, with costs and attorney fees to be paid by the Defendant, City of Bettendorf, IA. The Court now permanently enjoins the Defendant, City of Bettendorf, IA, from enforcing its zoning ordinances against the Plaintiff, Planned Parenthood of Greater Iowa, Inc., on the site where it proposes to construct a medical

Because Planned Parenthood did not appeal the March 19, 1996 quasi-judicial fact finding of the Bettendorf City Council, which denied the Zone Change from PUD to C-5, that determination is now final and is res judicata under Iowa Law. Further, it is a final judgment as to which the Federal Courts must give full faith and credit and recognition under the **Res Judicata** and **Stare Decisis Doctrines** and the rule of law expressed in ***University of Tennessee v. Elliott***, 478 U.S. 788, 799, 92 L.Ed.2d 635, 106 S.Ct. 3220 (1986); ***Migra v. Warren City School Dist. Bd. of Ed.***, 465 U.S. 75, 77 fn.1, 79 L.Ed.2d 56, 104 S.Ct. 892, 894 fn.1 (1984). See, also, ***Plough v. West Des Moines Community School District***, 70 F.3d 512 at 517 (CA 8TH 1995) in which Judge Wolle sat as the ***Plough*** trial Judge.

The Trial Court's Final Judgment of February 12, 1998 which held that the Bettendorf City Council's quasi-judicial fact finding and determination was fraudulent and replaced that finding with the Trial Court's Declaration that a majority (4-3) of the City Council were untruthful and that the zone change would be mandated by the Federal District Court was a clear violation of the Laws of Zoning described above.

The findings of fact by the U.S. District Court regarding the motives of a simple majority (see "Findings on Disputed Facts" **[#52, PA 426, v.3]** reading, "The court finds not believable the testimony of the Mayor and the majority of City Council members about why they voted to reject P & Z recommendation." [our emphasis]) are flawed and inadequate and do not support Judge Wolle's "Conclusion of Law" and Declaration that the "site is now declared to be zoned C-5, a classification appropriate for the clinic plaintiff plans to operate." (See "Declaratory Judgment and Decree" at **#52, PA 431, v.3**).

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clinic. That site is now declared to be zoned C-5, a classification appropriate for the clinic Plaintiff plans to operate. (cc: all counsel) [Bill of Costs sent to Pltf Planned Parenthood] 20 OJ 30 (lh) [Entry date 02/13/98]" (Our emphasis.)

The "Protest Rules" allowed by Iowa State law required a "super-majority" (6-1) vote and a simple "majority" vote is insufficient to support Judge Wolle's conclusion. Further, on March 3, 1998, the U.S. Supreme Court, in a unanimous decision in ***Bogan et al. v. Scott-Harris***, No. 96-1569, ___ U.S. ___, (March 3, 1998) firmly re-established the Hornbook Zoning law which holds that the motives of legislators are not to be made the subject of judicial inquiry (in which case the U.S. Supreme Court held that matters which were "implicit" [Hornbook Law] were made "explicit" by that decision).

It is "implicit" Hornbook Law that a Judge cannot rezone property. See ***Day v. City of Los Angeles***, 11 Cal.Rptr. 325, 189 Cal.App.2d 415 (1961).

The U.S. Supreme Court held in ***University of Tennessee v. Elliott***, supra at 799, that where a state administrative body acting in a judicial capacity has resolved disputed issues of fact properly before it, which the parties have had an adequate opportunity to litigate, federal courts in **42 U.S.C. §1983** civil rights cases must give that administrative body's fact finding the same preclusive effect to which it would be entitled in the State's courts. That holding applies in this case to the unreviewed fact finding and determination of the Bettendorf City Council, acting in a quasi-judicial capacity, voted 5-1 against the proposed Zone Change Ordinance that would have changed the Planned Parenthood real property zoning from PUD Zone to C-5 Zone.

Planned Parenthood is attempting to use this Federal Civil Rights lawsuit to override the effect of the **11TH Amendment** upon the City Council's unreviewed quasi-judicial fact finding. Planned Parenthood could have, but did not obtain State judicial review of the specific questions of law which they raised in the Federal Civil Rights lawsuit. If Planned Parenthood wanted to nullify and reverse the City Council's Zoning decision, they were under an obligation to appeal the matter within the State Court System, as provided by the **11TH Amendment** and Iowa State Law.

The fact that Planned Parenthood chose not to seek state

court review is immaterial. What is key is that: (1) Planned Parenthood had an opportunity to fully litigate all issues; (2) immediate state judicial review of said administrative action was available; and (3) the unreviewed City Council quasi-judicial fact finding decision and order has now become final and fully enforceable under Iowa law. Said fact finding decision and order has a preclusive effect under Iowa law on federal plaintiff's constitutional claims asserted herein. See ***Plough v. West Des Moines Community School District***, 70 F.3d 512 at 516-517 (CA 8TH 1995).

Applying Iowa law, Planned Parenthood is barred from "switching forums" and relitigating the question of the constitutionality of the regulatory scheme of the Bettendorf Zoning Code, having raised this specific question before in the prior state zone change proceeding, ***Pennzoil Co. v. Texaco, Inc.***, 481 U.S. 1, 95 L.Ed.2d 1, 107 S.Ct. 1519 (1987).

The U.S. Supreme Court has held that judgments in state proceedings must be given both issue and claim preclusion effect to subsequent actions under **42 U.S.C. §1983** by federal courts. See, ***Allen v. McCurry***, 449 U.S. 90, 104, 60 L.Ed. 2d 308, 101 S.Ct. 441 (1980) at 104:

> "There is . . . no reason to believe that Congress intended [section 1983] to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all." (Our emphasis.)

See, also, ***Migra v. Warren City School Dist. Bd. of Ed.***, 465 U.S. 75 at 77 n.1, 79 L.Ed.2d 56, 104 S.Ct. 892 at 894 n.1 (1984) (Parties may not raise in federal court **§1983** litigation issues that could have been litigated in an earlier proceeding). Both the ***Allen*** and ***Migra*** decisions support the view that Congress, in enacting the Reconstruction Civil Rights Statutes, did not intend to create an exception to general rules of preclusion, and these considerations apply to quasi-judicial

administrative actions where there has been an adequate opportunity to litigate. See ***University of Tennessee***, supra, at pages 796-799.

III

UNDER THE *ROOKER-FELDMAN* ABSTENTION DOCTRINE, A FEDERAL DISTRICT COURT IS WITHOUT AUTHORITY AND HAS NO JURISDICTION TO REVIEW FINAL DETERMINATIONS OF STATE JUDICIAL ACTS, BECAUSE SUCH REVIEW CAN ONLY BE CONDUCTED BY THE SUPREME COURT.

Dist. of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 75 L.Ed.2d 206, 103 S.Ct. 1303 (1983), reinvigorated the doctrine in ***Rooker v. Fidelity Trust Co.***, 263 U.S. 413 (1923) (in which the Supreme Court established a jurisdictional rule which bars lower federal courts from reviewing state court judgments). See, in this regard, ***Dubinka v. Judges of the Superior Court***, 23 F.3d 218 at 221, 222 (9TH Cir. 1994). The ***Rooker-Feldman*** rationale is consistent with common-law rules of preclusion which apply to the fact finding decisions of state administrative bodies (as here) where adequate judicial review is available (see ***University of Tennessee v. Elliott***, supra, at page 799). Thus, this Federal District Court's review of the final determinations of the Bettendorf City Council zone change proceeding is barred.

IV

PLANNED PARENTHOOD DID NOT COMPLY WITH THE DETERMINATION BY THE DIRECTOR OF STATE HEALTH DEPT. THAT ITS PROPOSED CLINIC CONSTRUCTION IS SUBJECT TO THE STATE CERTIFICATE OF NEED (C.O.N.) STATUTE REQUIREMENTS.

In an earlier case, see ***Planned Parenthood of Greater***

Iowa v. Atchison, 126 F.3d 1042 at 1042-1049 (8TH Cir. Sept. 25, 1997), in which Judge Wolle sat as the Trial Judge, hereinafter referred to as the "***Atchison*** Case". Planned Parenthood had been informed by the Director of the State Health Dept., Christopher Atchison, that it must comply with the State **Certificate of Need Statute**, (enacted in 1977 by the Iowa General Assembly. See **1977 Iowa Acts, Ch. 75**) requirements, known as the "C.O.N. process". In the ten years prior to the Planned Parenthood case, no similarly structured health care facility which opened in the State was made to apply for a **Certificate Of Need**. The Planned Parenthood facility was the first "similarly structured health care facility" to provide abortion services.

The State Health Department, in considering this new subject-matter for the first time, administratively determined that, as a matter of State public policy, the introduction of this additional feature provided cause for a reexamination of the State Health Department's interpretation of the **C.O.N. Statute**.

Planned Parenthood filed its lawsuit against the Director of the State Health Department of Iowa, a Sovereign State, pursuant to **42 U.S.C. §1983**, but in violation of the **11TH Amendment** and ***Watson v. Buck***, 313 U.S. 387, 61 S.Ct. 962 (1941), seeking a declaratory judgment that the Defendants' reviewability determination unconstitutionally burdened potential patient's privacy rights because it was made for the purposes of, and would have the effect of imposing an obstacle on access to abortion— the same objection which was used in ***Planned Parenthood v. City of Bettendorf***.

Christopher G. Atchison, in his capacity as the Director of the Dept. of Health of the State of Iowa in its Sovereign capacity, moved the U.S. District Court to dismiss and abstain from exercising subject matter jurisdiction pursuant to ***Younger v. Harris*** (the ***Younger-Huffman*** **Abstention Doctrine**),401 U.S. 37, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971). The U.S. District Court (with Judge Wolle sitting as the Trial Judge) improperly rejected the State's "Sovereignty" claim and dismissed the Motion, and after a one-day court trial, enjoined

the Defendants from requiring the Plaintiff to comply with the **C.O.N. Statute** requirements. The Court of Appeals affirmed Judge Wolle's erroneous ruling in 126 F.3d 1042 (8TH Cir. Sept. 25, 1997).

Petitioner Murphy contends that the **C.O.N. Statute** was subject to two interpretations, and under ***Watson v. Buck***, 313 U.S. 387, 61 S.Ct. 962 (1941) and the ***Younger-Huffman*** **Abstention Doctrine**, the Federal Court was required to abstain and permit the Iowa State Supreme Court to decide which interpretation was correct. Because the State of Iowa had interposed what was an **11TH Amendment** Challenge (which required Planned Parenthood to plead and prove irreparable harm which was great and immediate), the State Sovereignty defense was not waived nor could it have been waived by merely going to trial. ***Santee Sioux Tribe of Nebraska v. Nebraska***, 121 F.3d 427 at 431 (C.A. 8TH Aug. 13, 1997). See also ***Steffel v. Thompson***, 415 U.S. 452, 39 L.Ed.2d 505 at p. 521 and 523, 94 S.Ct. 1209 (1974) which holds that such a judgment is not Res Judicata. Neither the City of Bettendorf nor Petitioner Murphy is bound by that Federal determination in a State Court.

One possible interpretation, which might be given by the Iowa Court in the future, is that it might "save" the **C.O.N. Statute** by adopting the interpretation given by the State Health Department and is binding upon Planned Parenthood in this case. Petitioner Murphy is justified in relying upon this latter interpretation in his contention that he has a right to intervene and correct that erroneous determination of an **11TH Amendment** "right" upon appeal. The recent ruling of the unanimous U.S. Supreme Court in ***Bogan et al. v. Scott-Harris***, No. 96-1569, ___ U.S. ___, decided March 3, 1998, suggests that the U.S. District Court was in error in implying an improper motive on the part of Director Atchison in the ***Atchison*** Case, supra.

IV(A) THE TEST IN *WATSON V. BUCK* IS CONTROLLING AND SHOULD HAVE BEEN APPLIED.

In ***Watson v. Buck***, 313 U.S. 387, 61 S.Ct. 962 (1941), the U.S. District Court for the Northern District of Florida had enjoined a Florida State Statute containing a severability clause which had never been before the Florida Supreme Court for interpretation. In reversing that judgment and the granting of the injunction, the U.S. Supreme Court held at pages 401-402 that a state statute which contains a severability clause must be:

> "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph, and in whatever matter and against whomever an effort might be made to apply it . . ."

before a federal court can interfere with the right of the state court to interpret such legislation.

In such a case it is reversible error for a federal court to grant an injunction and preempt the state court from its function, unless the record shows there were "exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights. . . ." Further, under ***Watson v. Buck***, supra, that "clear showing" must demonstrate that the danger of irreparable loss "is both great and immediate." Otherwise, the defenses must be set up in the state court even though the validity of the ordinance is challenged, for there is ample opportunity for ultimate review by the United States Supreme Court of federal questions. It is patent upon the face of the record below that the ***Watson v. Buck***, supra, requirements of "irreparable loss . . . both great and immediate" have not been established.

IV(B) A NUMBER OF IMPORTANT STATE INTERESTS ARE INVOLVED IN THE PLANNED PARENTHOOD FEDERAL CIVIL RIGHTS LAWSUIT.

This federal case has impaired a number of important and compelling state interests and rights of the City of Bettendorf, Iowa, a Home Rule City.

Unless effective, summary relief is accorded cities against such unlawful "collateral" attacks in the federal district court, the City of Bettendorf will sustain the same type of irreparable harm as that suffered by the State of Ohio in ***Huffman v. Pursue Ltd.***, 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200 (1975), and by other cities in similar cases, where important state laws are prevented from being presented to the state appeals courts and the U.S. Supreme Court for an authoritative construction of state law under the federal Constitution.[3/]

[3/] Because of the federal court interference with state appellate proceedings, in ***Huffman***, the substantive appellate question involving application of state law (re "closure" of a public nuisance) was never decided, and could never be presented to the U.S. Supreme Court for definitive review. ***Huffman*** involved the power of a state court to close a 100% continuing public nuisance (obscenity) (utilizing a remedial approach acceptable under **Red Light Abatement Statutes**, where the object is the reformation of property used to conduct a per se public nuisance [prostitution]). Because a final state determination on this important legal issue, regarding the scope of available state remedies, was collaterally blocked by the federal courts in ***Huffman***, an Ohio appellate determination on "closure" was unavailable as a precedent for the State of Ohio and for other state court systems, and the substantive legal issue could not be reviewed by the U.S. Supreme Court, leaving the "closure" issue, to date, unsettled across the Nation.

The question of the extent to which the states may exercise the remedy of "closure" in connection with the exercise of their police power has arisen in other state cases, with varying results. See ***State of Idaho ex rel. Kidwell et al. v. U.S. Marketing, Inc., et al.***, 102 Idaho 451 (1982), jur. noted 454 U.S. 1140 (1982), and app. dismissed 455 U.S. 1009 (1982), in which a unanimous State Supreme Court upheld the constitutionality of

IV(C) THE STATE COURT WITH A "DIRECT" ATTACK ON THE "PENDING" STATE ACTION PROVIDES A MORE EFFICIENT JUDICIAL FORUM FOR THE RESOLUTION OF DISPUTES THAN THE "COLLATERAL" CHALLENGES BEING ASSERTED IN THE FEDERAL COURT AGAINST STATE STATUTES AND CITY ORDINANCES.

The exercise of federal jurisdiction interfering with a state zoning statute or zoning ordinance is not proper, except where the challenged law is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph and in whatever manner and against whomever an effort might be made to apply it." ***Watson v. Buck***, 393 U.S. 387, 61 S.Ct. 962 (1941).

Without doubt, the U.S. District Court has jurisdiction in the instant case to decide the question of jurisdiction. ***U.S. v. United Mine Workers of America***, 330 U.S. 258, 91 L.Ed. 884, 67 S.Ct. 677 (1947). Where, however, a state statute or a city ordinance involving an "important state interest" is susceptible of a construction which will render the statute constitutional

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one-year closure provision and award of attorney fees against a pornographic bookstore. Compare, Jurisdictional Question #1 posed in the Petition for Writ of Certiorari in ***Cooper v. Mitchell Brothers Santa Ana Theater et al.***, No. 81-271, October Term 1980, decided on other grounds in 454 U.S. 90 (1981), and Jurisdictional Question #1 posed in ***Cooper v. Mitchell Bros. Santa Ana Theater et al.***, No. 82-345, October Term 1982, denied in 459 U.S. 944 (1982). Because the applicability of "closure" to the public nuisance abatement process involving pornographic outlets has never been answered by the U.S. Supreme Court, after a protracted, time-consuming and expensive abatement procedure in which it was demonstrated that the defendant Mitchell Brothers had engaged in the regular, continuous exhibition of obscene films as a course of conduct continuing over a period of 10 years, the City of Santa Ana was forced to "throw in the towel" in 1987, and settled the controversy by paying defendants their attorney's fees and allowing their pornographic outlet to continue operations in Santa Ana.

under ***Middlesex Ethics Comm. v. Garden State Bar Assn.***, 457 U.S. 423, 73 L.Ed.2d 116, 102 S.Ct. 2515 (1982), the federal court must abstain and must allow the matter to be returned to the state court system for an authoritative construction by the state court. One of the principle reasons why this result is mandated is the fact that a federal court lacks jurisdiction to authoritatively construe state legislation, ***U.S. v. Thirty-Seven Photographs***, 402 U.S. 363, 28 L.Ed.2d 822, 91 S.Ct. 1400 (1971), a task routinely performed by state court.

There is a marked difference in the way in which the state and federal courts approach the constitutional issue regarding legislation. In ***People ex rel. Busch v. Projection Room Theater***, 17 Cal.3d 42 at 56, 130 Cal.Rptr. 328 (1976), the California Supreme Court noted, at page 336:

> " Furthermore, the United States Supreme Court recently emphasized within the foregoing context that courts have an obligation to construe statutes in such a way as to avoid serious constitutional doubts . . ." (Our emphasis.)

and, at page 338:

> " We are obliged to construe and interpret legislation in a manner which will uphold its validity. (*Citations*). Thus, the courts have held that provision for a prior adversary hearing may be implied by law in otherwise silent statutory provisions."

Additionally, the question as to whether defective federal and state legislation may be "saved" by statutory construction or by severance of the defective portion presents important public policy matters for federal and state governments. See ***Tilton v. Richardson***, 403 U.S. 672 at 684, 29 L.Ed.2d 790, 91 S.Ct. 2091 (1971), where Chief Justice Burger noted: " The cardinal principle of statutory construction is to save and not destroy."

The question as to whether a state statute is severable is more properly a matter for the state court. In a statement confirming the importance of the "statutory construction" factor and the right of state courts to interpret city ordinances, this Court in ***Metromedia, Inc. v. San Diego***, 453 U.S. 490 at 521 fn.6, 69 L.Ed.2d 800, 101 S.Ct. 2882 (1981) (involving a direct appeal of a city ordinance after a state court decision by the California Supreme Court upholding the ordinance as being constitutional on its face) remanded the case back to the California Supreme Court for further statutory construction by the state court, notwithstanding the fact that the U.S. Supreme Court held the ordinance to be unconstitutional on its face.

IV(D) PLANNED PARENTHOOD HAS FAILED TO STATE A CAUSE OF ACTION UNDER 42 U.S.C. §1983 IN THAT IT HAS FAILED TO PLEAD AND PROVE WHY THE PRINCIPLES ESPOUSED IN *WATSON V. BUCK* AND *HUFFMAN V. PURSUE, LTD.* DO NOT CONTROL SO AS TO REQUIRE A DISMISSAL FOR LACK OF FEDERAL JURISDICTION.

Under the rationale expressed in ***Allen v. McCurry***, 449 U.S. 90, 60 L.Ed. 2d 308, 101 S.Ct. 441 (1980), and ***Parratt v. Taylor***, 451 U.S. 527, 68 L.Ed.2d 420, 101 S.Ct. 1908 (1981), Congress intended to establish federal jurisdiction under **42 U.S.C. §1983** where one of the following three circumstances is shown to exist: (1) the State substantive law is facially and totally unconstitutional; (2) the State procedural law is inadequate to allow full litigation of a constitutional claim; or (3) the State procedural law, though adequate in theory is inadequate in practice.

Here, none of the foregoing apply. As noted by District Judge Young's analysis of ***Parratt***, supra, in ***Juncker v. Tinney III***, 549 F.Supp. 574, the Constitutional question may be interpreted as neither "abstention" nor "whether the plaintiff has exhausted his state judicial remedies", but rather whether the

plaintiff has stated a claim upon which relief can be based.

In ***Vickory v. Walton***, 721 F.2d 1062 (6TH Cir. 1983), cert. denied in ***Vickory v. Walton, Sheriff, Butler County***, No. 83-2111, 53 L.W. 3237 (1984), a majority of the Justices on a panel of the Sixth Circuit held that, under ***Parratt***, supra, the plaintiff must attack the state corrective procedure as well as the substantive wrong and held that the plaintiff had neither alleged nor shown any significant deficiency of the state remedy. Applying the analysis and pleading requirement of the Sixth Circuit in ***Vickory v. Walton***, supra, to the Statement of Facts herein, including the impact of the governing rule of law as expressed in ***Watson v. Buck***, supra, on such facts, it is clear that Planned Parenthood has neither alleged nor proven a cause of action under **42 U.S.C. §1983**, and the City of Bettendorf was entitled to a judgment of dismissal for failure to state a claim upon which federal relief could be granted.

Parratt, supra, bars Federal Plaintiffs from maintaining their federal civil rights action, because Federal Plaintiffs have been afforded adequate state remedies: both an appeal of the City Council action within the state court system and an opportunity for construction of relevant state laws in the related state declaratory judgment action. Thus they cannot show the requisite constitutional deprivation.

V

THE PRIVATE RIGHT TO AN ABORTION DOES NOT JUSTIFY A FEDERALLY MANDATED ZONE CHANGE AND A FEDERALLY MANDATED ABORTION FACILITY IN BETTENDORF. BOTH ISSUES PRESENT "IMPORTANT STATE INTERESTS" INVOLVING "PUBLIC MORALS" FOR A DETERMINATION BY A STATE COURT.

The private right to an abortion does not justify the mandating of a zone change by a federal judge and the mandating of an abortion facility in Bettendorf, Iowa. The City of Bettendorf is a Home Rule City endowed with all of the

Sovereign Rights of the State of Iowa. If an abortion facility is to be constructed in Bettendorf, Iowa, that matter is for the State of Iowa acting by and through its State Legislature and State Judiciary. See the discussion of Home Rule in ***Goodell, et al. v. Humboldt County, Iowa, et al.***, 1998.IA.36 <http://www.versuslaw.com> and the **Iowa Constitution, Article III, §38A and §39A**.

VI

"PRIVATE MORALITY" AND "PUBLIC MORALITY" ARE "CONCEPTS" WHICH ARE WORLDS APART. THE LEGAL DISTINCTION BETWEEN A "PRIVATE" RIGHT TO AN ABORTION AND A "PUBLIC" RIGHT TO AN "ABORTION CLINIC" IN EVERY NEIGHBORHOOD IS CLEAR AND MUST BE STRICTLY ADHERED TO.

See, by analogy, the public policy restraints imposed upon pornography, ***Rex v. Curl***, 2 Strange 789 (1727); ***Louis B. Schwartz***, co-reporter of the **Model Penal Code**, explaining the "public morals" function (obscenity proscription) in **63 Columbia Law Review**, "***Morals Offenses and The Model Penal Code***" at pages 671, 672 and 681. Concerning the power of government to regulate matters relating to "public morals" and power to say what is offensive to public morality, the members of the U.S. Supreme Court, sitting in ***Mugler v. Kansas***, 123 U.S. 623 (1887) said:

> "The power to determine such questions (what is offensive to public morality) so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding their own appetites or passions, may be willing to imperil the peace and security of many, provided only they are permitted to do as they please. Under our system, that power is lodged in the legislative branch of government. It belongs to that department to

> exert what are known as police powers of the state, and to determine primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.). . ." (Our emphasis.)

How can parents instruct their offspring that "abortion" is an "abomination" and "socially abhorrent" when "society" in the form of a federal court is permitted to "mandate" a zone change to accommodate the creation of an abortion clinic in a local neighborhood so that a private "sinner" may not be subjected to the inconvenience of a 50 mile trip to an existing facility! At the very least, the State of Iowa has an **11TH Amendment** right to keep an abortion clinic out of a residential neighborhood!

VII
STANDARD FOR GRANTING INTERVENTION AS OF RIGHT.

Intervention as of right pursuant to **Federal Rule of Civil Procedure 24(a)(2)** requires a showing of the following four elements: (1) the proposed intervener possesses a cognizable interest in the subject matter of the litigation; (2) the cognizable interest may be impaired as a result of the litigation; (3) the cognizable interest may not be adequately protected by the existing parties to the litigation; and (4) the motion to intervene must be timely under the circumstances of the case. See, ***Chiglo v. City of Preston***, 104 F.3d 185, 187 (8TH Cir. 1997); ***U.S. v. Union Elec. Co.***, 64 F.3d 1152, 1157-1158 (8TH Cir.1995); ***Nash v. Blunt***, 104 F.R.D. 400, 403-404 (W.D. Mo. 1992), affirmed in ***African American Voting Rights Legal Defense Fund, Inc. v. Blunt***, 507 U.S. 1015 (1993).

When evaluating the four elements for intervention, courts resolve all doubts in favor of the proposed intervener. See ***Sierra Club v. Robertson***, 960 F.2d 83, 86 (8TH Cir. 1992). This serves the underlying purpose of Intervention which is to liberally construe circumstances to permit intervention so that

disputes can be resolved in a single proceeding rather than risking prolonged, or piecemeal, litigation. See, ***Arkansas Elec. Energy Consumers v. Middle S. Energy, Inc.***, 772 F.2d 401, 404 (8th Cir. 1985) (liberally construed); ***Nuesse v. Camp***, 385 F.2d 694, 700 (D.C. Cir. 1967) (avoid lengthy and piecemeal litigation). As shown below, Petitioner Murphy amply satisfies the above four elements.

VIII

PETITIONER MURPHY, BY VIRTUE OF HIS STATUS, AS AN OWNER OF REAL PROPERTY WITHIN 200 FEET OF THE PLANNED PARENTHOOD PROPERTY, POSSESSES A COGNIZABLE INTEREST IN THE DENIAL OF THE APPLICATION FOR A ZONE CHANGE BY THE BETTENDORF CITY COUNCIL.

"The court should be mindful that '[t]he "interest" test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." Id, at 1163, quoting, ***S.E.C. v. Flight Transp. Corp.***, 699 F.2d, 943, 948 (8th Cir. 1983).

The interest of Petitioner Murphy is four fold:

First: Under his "vested rights" under the Iowa Constitution, Petitioner has a legally protectable, direct and substantial interest in defending the legality and constitutionality of the Bettendorf City Council's denial of the Planned Parenthood zone change application under Iowa State Law pursuant to the successful "protest" exercised by 20% of the adjacent property owners under their "vested rights" set forth in **§24.3** and **§24.4** of the **Bettendorf Zoning Ordinance**. Under **§24.4**, six members of the Bettendorf City Council have not voted for the Zoning Amendment. Therefore, under Iowa law, such amendment cannot become effective.

Because Petitioner's Interest is a vested property right, protected by the Iowa Constitution, he also has **Article 3**

"standing" to sue and defend this "states" right in the absence of the Defendant City of Bettendorf, where the City of Bettendorf does not appeal, ***Nemmers v. City of Dubuque, Iowa***, 716 F.2d 1194 (1983).

Second: Planned Parenthood has not complied with the State of Iowa **C.O.N. Statute** enacted in 1977 by the Iowa General Assembly. See **1977 Iowa Acts, Ch. 75**. Petitioner Murphy contends that neither he nor the City of Bettendorf is bound by the erroneous decision in ***Planned Parenthood of Greater Iowa v. Atchison***, supra, and that the City of Bettendorf should have raised that error and the **11TH Amendment** defense. Petitioner Murphy has raised both defenses in this appeal. The **11TH Amendment** defense was not waived by going to trial, nor could it be. ***Santee Sioux Tribe of Nebraska v. Nebraska***, 121 F.3d 427 at 431 (C.A. 8TH Aug. 13, 1997) (Hansen and Gibson, with McMillian dissenting).

Third: Petitioner has an economic and environmental interest in the adjacent real estate within 200 feet of the Planned Parenthood parcel which will suffer a potential loss in the Fair Market Value of such property by virtue of the proposed abortion clinic and damage to the environment (public morals) by virtue of the "scandal-giving" presence in the neighborhood of a clinic that performs abortions, which suggests to children and those living in Petitioner Clarence Murphy's Rental Apartments that, in the Judeo-Christian culture, there is nothing immoral in undergoing an abortion, and that an abortion is not forbidden by the Natural Law as codified in the Commandments given to Moses.

Finally: When it is shown, as here, that the City of Bettendorf, the governmental party to the litigation is not protecting the interests of the citizens by failing to take the jurisdictional issue which is raised by the **11TH Amendment**, to the U.S. Supreme Court, then intervention by those citizens is proper. See ***Chiglo v. City of Preston***, 104 F.3d 185, 187 (8TH Cir. 1997). **Id. at 188.**

As a specific example of a situation where citizens could intervene to protect the public interest, the 8TH Circuit cited

Yniguez v. State of Arizona, 939 F.2d 727 (CA 9, 1991) with approval in ***Chiglo v. City of Preston***, 104 F.3d 185 at 189 (8TH Cir. 1997). In ***Yniguez***, the Court granted intervention to vindicate the public interest in seeing the state's law defended when the "governor failed to appeal from [a] judgment invalidating [an] initiative measure [where the]; governor had previously expressed political opposition to the measure." Id. at 189, citing, ***Yniguez***, 939 F.2d at 737. On March 3, 1997, a unanimous U.S. Supreme Court reversed ***Yniguez*** in ***Arizonans for Official English and Robert D. Park, Petitioners v. Arizona***, 520 U.S. ___ (March 3, 1997), and on March 4, 1998, cited with approval its decision in ***Yniguez***, supra, at **Point III** of the majority opinion of the U.S. Supreme Court in ***Steel Co. v. Citizens for a Better Environment***, ___ U.S. ___, 140 L.Ed.2d 210, ___ S.Ct. ___ (March 4, 1998), reaffirming the rule of law that, "on every . . . appeal, the first and fundamental question is that of jurisdiction . . . of the court from which the record comes." See also, ***Nash v. Blunt***, supra, and ***Mille Lacs Band of Chippewa Indians v. Minnesota***, 989 F.2d 994, 1001 (8TH Cir. 1993)

IX
PETITIONER'S MOTION IS TIMELY UNDER THE CIRCUMSTANCES.

The "general rule [is] that a post-judgment motion to intervene is timely if filed within the time allowed for filing an appeal" (Our emphasis). ***Yniguez***, supra, 939 F.2d at 734. Given the circumstances of this case, that rule must be applied here:

First, Petitioner Murphy had a right to believe that the City of Bettendorf would discharge its duty to defend the laws of the State of Iowa. That duty is grounded on the **11TH Amendment** claim that the U.S. District Court does not have subject matter jurisdiction of this very important State interest.

Second, Petitioner Murphy had no way of determining that a defense on Appeal would not be offered by the City of

Bettendorf, until after the February 12, 1998 Order.

Judge Wolle improperly used his power to assess attorney's fees. His conduct in this case (failure to abstain, resisting Petitioner's valid claims, refusing to hold oral argument) and the other two ***Planned Parenthood*** cases (failure to abstain; refusing to recuse himself) is evidence of an improper bias and the very reason for the adoption of the **11TH Amendment**. See **Appendix B** to this ***Petition***.

X

MEEK V. METROPOLITAN DADE COUNTY, THE SOLE AUTHORITY CITED BY JUDGE WOLLE IN DENYING PETITIONER'S MOTION TO INTERVENE, DOES NOT SUPPORT HIS FINDING ON "TIMELINESS". *MEEK* CONCLUDED THAT SUCH A DENIAL ON "TIMELINESS" GROUNDS WOULD BE AN ABUSE OF DISCRETION.

Instead of granting one of the alternative motions (with respect to time), U.S. District Judge Wolle declined both of the proposed Orders which were submitted and, instead, filed his own Order (**see #57, PA 490, v.3**) which, in a cursory fashion, denied Clarence Murphy's ***Motion to Intervene*** as being "untimely", citing ***Meek v. Metropolitan Dade County***, 985 F.2d 1471, 1478-79 (11TH Cir. 1993) as Judge Wolle's sole authority. The facts in the ***Meek*** case do not support the Court's finding on "timeliness". In that case, the ***Meek*** Court concluded that such a finding would be improper:

> "Therefore, based on our review of the totality of circumstances in this case, we conclude that the denial of intervention on timeliness grounds would have been an abuse of discretion". (Our emphasis.)

Clarence Murphy's "***Memorandum in Support of Motion to Intervene***" at page 4 cited ***Chiglo v. City of Preston***,

104 F.3d 185 at 189 (8TH Cir. 1997) as being the controlling precedent. ***Chiglo***, in turn, cites the ***Meek*** case and ***Yniguez v. State of Arizona***, 939 F.2d 727 (CA 9 1991) as being apposite.

XI

THAT PART OF JUDGE WOLLE'S ORDER OF APRIL 21, 1998, READING, "MOREOVER, MURPHY HAS CITED NO CONTROLLING CONSTITUTIONAL PROVISION, STATUTE OR CASE LAW SUPPORTING HIS MOTION TO ENTER THE LAWSUIT AFTER JUDGMENT WAS ENTERED" IS PATENTLY FALSE.

In the light of the pleadings heretofore filed in this case, (see **Exhibits 1** through **Exhibit 10** to Clarence Murphy's ***Renewed Request for Oral Argument Pursuant to Local Rule 14[c] and Good Cause Shown on Issues of Intervention, Res Judicata and Lack of Subject Matter Jurisdiction*** [see **#68, PA 548-551**] in support of Clarence Murphy's ***Motion to Intervene***), and the U.S. District Court's repeated refusal to grant oral argument without further explanation, Judge Wolle's May 11, 1998 Order is incomprehensible. See, also, the "**Issues on Appeal**" at paragraph 19 of the Complaint in Intervention (at **#52, PA 403-408, v.3**). All of the facts of record support the opposite conclusion [4/]

4/

1. The U.S. Supreme Court has held to the contrary in ***United Airlines, Inc. v. McDonald***, 432 U.S. 385, 396, 53 L.E.2d 423, 97 S.Ct. 2464 (1977), (holding a motion to intervene for purposes of taking an appeal was timely because it was filed within the period in which the parties could have taken an appeal), cited with approval by the 8TH Circuit in ***Jenkins v. State of Missouri***, 967 F.2d 1245, 1248 (CA 8TH 1992).
2. The 8TH Circuit has endorsed the procedure employed by Clarence Murphy. See ***Jenkins v. State of Missouri***, supra.
3. If this Court's Judgment is permitted to stand, Clarence Murphy will have been divested of his state "vested rights" under the Iowa

Judge Wolle's injunction is a clear example of an unauthorized collateral federal appeal which substantially disrupts and interferes with the state appellate procedures which are en train. See **footnote 3** at page 18, supra.

Dated: January 28, 1999

Respectfully submitted,

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for Petitioner Clarence Murphy.

Constitution to "protest" under **Bettendorf Zoning Ordinance §24.3** and **§24.4**.

4. Clarence Murphy's loss of a "vested right" fulfills all of the requirements for "standing", see ***Lujan v. Defenders of Wildlife***, ___ U.S. ___, 119 L.E.2d 331, 112 S.Ct. 2130, 2144 (1992).
5. Clarence Murphy's loss of a "vested right" fulfills all of the requirements for Intervention, see ***Meek v. Metropolitan Dade County***, 985 F.2d 1471 at 1488 (11TH Cir. 1993) (a complainant in intervention who shows standing is deemed to have a sufficiently substantial interest to intervene).
6. Clarence Murphy has both pleaded and established standing.
7. As a matter of Law, Planned Parenthood would not be prejudiced by the granting of the motion to intervene. Clarence Murphy merely stands in the stead of the City of Bettendorf on Appeal.
8. Planned Parenthood, by not naming Clarence Murphy in its Federal Civil Rights lawsuit, has violated the **Equitable Clean Hands Doctrine**.
9. By its decision not to appeal, the City of Bettendorf, which heretofore has been acting on Murphy's behalf as the parens patria (see Clarence Murphy's Confidential letter to the Bettendorf City Council, dated April 3, 1998 **at [#58] PA 498-501**) has endangered Clarence Murphy's cognizable interest, which requires that he now intervene and appeal.

APPENDIX A: ORDERS

ORDER OF THE U.S. DISTRICT COURT IN *PLANNED PARENTHOOD, ETC., V. CITY OF BETTENDORF, IOWA*, NO. 3-97-CV-80056, DATED DECEMBER 8, 1997., ... A-1

ORDER OF THE U.S. DISTRICT COURT IN *PLANNED PARENTHOOD, ETC., V. CITY OF BETTENDORF, IOWA*, NO. 3-97-CV-80056, DATED MARCH 17, 1998, ... A-3

ORDER OF THE U.S. DISTRICT COURT IN *PLANNED PARENTHOOD, ETC., V. CITY OF BETTENDORF, IOWA*, NO. 3-97-CV-80056, DATED APRIL 21, 1998., ... A-6

ORDER OF THE U.S. DISTRICT COURT IN *PLANNED PARENTHOOD, ETC., V. CITY OF BETTENDORF, IOWA*, NO. 3-97-CV-80056, DATED MAY 11, 1998., ... A-9

ORDER OF THE U.S. DISTRICT COURT IN *PLANNED PARENTHOOD, ETC., V. CITY OF BETTENDORF, IOWA*, NO. 3-97-CV-80056, DATED JUNE 1, 1998., ... A-11

ORDER OF THE U.S. COURT OF APPEALS FOR THE 8TH CIRCUIT IN BOTH *PLANNED PARENTHOOD, ETC., APPELLEE V. CITY OF BETTENDORF, IOWA, DEFENDANT, CLARENCE MURPHY, ETC., APPELLANT.*, NO. 98-2496SID, AND *IN RE CLARENCE MURPHY, ETC.*, NO. 98-2825SID, DATED JULY 23, 1998., ... A-12

ORDER OF THE U.S. COURT OF APPEALS FOR THE 8TH CIRCUIT IN *IN RE CLARENCE MURPHY, ETC.*, NO. 98-2825SID, DATED OCTOBER 2, 1998., ... A-14

ORDER OF THE U.S. COURT OF APPEALS FOR THE 8TH CIRCUIT IN *PLANNED PARENTHOOD, ETC., APPELLEE V. CITY OF BETTENDORF, IOWA, DEFENDANT, CLARENCE MURPHY, ETC., APPELLANT.*, NO. 98-2496SID, DATED OCTOBER 7, 1998., A-15

NOTICE OF *ORDER* ENTERED BY U.S. SUPREME COURT ASSOCIATE JUSTICE CLARENCE THOMAS, IN *IN RE CLARENCE MURPHY, ETC.*, APPLICATION NO. A-501, DATED DECEMBER 21, 1998., ... A-16

NOTICE OF *ORDER* ENTERED BY U.S. SUPREME COURT ASSOCIATE JUSTICE CLARENCE THOMAS, IN *CLARENCE MURPHY, PETITIONER V. PLANNED PARENTHOOD, ETC.*, APPLICATION NO. A-502, DATED DECEMBER 31, 1998., . A-18

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

FILED
DES MOINES, IOWA
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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

PLANNED PARENTHOOD OF GREATER IOWA, INC.,

Plaintiff,

vs.

THE CITY OF BETTENDORF, IOWA,

Defendant.

NO. 3-97-CV-80056

ORDER

On February 6, 1996, Vision Development, Inc. petitioned defendant to rezone property owned by plaintiff. On March 19, 1996, defendant rejected the petition. In this action brought pursuant to **42 U.S.C. section 1983**, plaintiff seeks declaratory and injunctive relief. It contends defendant's actions concerning the zoning of the property violate plaintiff's property rights and the privacy rights of its patients. Before the court for ruling are defendant's two motions for partial summary judgment, motions that the court heard during a telephone conference hearing on November 26, 1997.

Defendant contends in one motion that plaintiff's suit is barred because plaintiff did not timely file a petition for writ of certiori in the Iowa State District Court.

Defendant asks the court in its second motion to conclude as a matter of law that when considering an application for approval of a PUD preliminary site plan, it is appropriate for defendant to consider the economic impact on property values of adjacent properties and the neighborhood.

Defendant's first motion has no merit because plaintiff

isnotrequiredtoexhauststatecourtremediesbeforebringing asuitunder**42 U.S.C. §1983** in federal court. See ***Edwards v. Balisock***, 117 S.Ct. 1584, 1589 (1997).

The court denies defendant's second motion because the Federal Rules of Civil Procedure do not authorize the court to issue advisory opinion of the kind defendant here seeks. The court will make findings of fact and conclusions of law only after both parties have presented their evidence at trial, now scheduled to be held in Davenport on January 14, 1998.

Defendant's motions for partial summary judgment are denied.

IT IS SO ORDERED.

Dated this 8TH day of December, 1997.

/s/

CHARLES R. WOLLE, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

FILED
DES MOINES, IOWA

98 MAR 17 PM 4:40

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

PLANNED PARENTHOOD OF GREATER IOWA, INC.,)

Plaintiff,)

vs.)

NO. 3-97-CV-80056

THE CITY OF BETTENDORF, IOWA,)

ORDER

Defendant.)

The City of Bettendorf, Iowa (City) filed on February 19, 1998, a motion asking this court to reconsider its Findings of Fact and Conclusions of Law, filed on February 12, 1998, that granted the plaintiff Planned Parenthood of Greater, Iowa, Inc. (plaintiff) injunctive relief it had sought. On March 13, 1998, the court held a hearing by telephone conference call with counsel and allowed the attorneys to present oral argument and to file after the hearing further written support for their positions on each issue the motion to reconsider presents.

On several issues, the parties are in agreement. Of most importance, plaintiff does not object to having the court modify the injunction to allow the City to enforce its zoning laws against the plaintiff neutrally and to the same extent as they are legitimately enforced against other medical clinics operating or being operated in C-5 zones. Specifically, the plaintiff does not object to having this court modify the injunction to require the plaintiff to develop its planned clinic consistent with the site plan that plaintiff submitted on December 17, 1996, as part of its PUD application. The plaintiff also states it does not object to the modification of conditions of the site plan that is explained

in a letter from the City's attorney to plaintiff's counsel dated March 11, 1998 (attached to plaintiff's response and now attached to this order as Addendum A). Consequently, this court's declaratory judgment and decree filed on February 12, 1998, is modified to substitute for paragraph 3, page 28, the following paragraph:

> 3. The court now permanently enjoins the defendant City of Bettendorf, Iowa, from enforcing its zoning ordinances on the site where the plaintiff proposes to construct a medical clinic, in any manner that prevents the clinic from being constructed and operated. That site is now declared to be zoned C-5, a classification appropriate for the clinic plaintiff plans to operate. The City may enforce its zoning laws against the plaintiff neutrally and to the same extent as they are legitimately enforced against other medical clinics operating or being developed in C-5 zones. The City may require the plaintiff to develop its clinic consistent with the December 17, 1996, site plan that the plaintiff submitted to the City as part of its PUD application. The City may enforce a modified set of conditions set forth on Addendum A attached to this order.

The city also seeks to impose on the plaintiff the condition that a six foot high wrought-iron fence be constructed around the entire perimeter of the property. The plaintiff objects, and the court will not modify its injunction and decree to require such a fence. Nothing in this case suggests that other medical clinics within C-5 zones are required to have such fences; requiring such a fence treats the plaintiff differently than other persons operating medical clinics. The City has made no evidentiary showing of a legitimate governmental interest in requiring such a fence around this facility. Requiring such a wrought-iron perimeter fence is not a neutral application of the City's zoning laws.

The City's motion also asks the court to make different

and expanded Findings of Fact. The court agrees that City Administrator Ploehn did not testify and the former City employee Salem was not then "acting director in the development department." The declaratory judgment and decree filed on February 12, 1998, is modified to reflect those corrections. The court does not agree with the other findings of fact the City asks this court to make upon reconsideration. The court may expand its Findings of Fact at the time it rules on the plaintiff's application for attorney's fees, now scheduled to be heard by telephone conference call the court will place to counsel of record at 8:00 a.m. on Tuesday, March 24, 1998.

IT IS SO ORDERED.

Dated this 17TH day of March, 1998.

/S/

CHARLES R. WOLLE, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

FILED
DES MOINES, IOWA
98 APR 21 PM 2:05
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

PLANNED PARENTHOOD OF GREATER IOWA, INC.,

Plaintiff,

vs.

THE CITY OF BETTENDORF, IOWA,

Defendant.

NO. 3-97-CV-80056

ORDER

Trial in this case was held on January 20 and 21, 1998. On February 12, 1998, this court filed its declaratory judgment and decree in this case, captioned ***Findings of Fact and Conclusions of Law***. The next day the clerk of court entered judgment in favor of plaintiff and against defendant. On March 17, 1998, on motion of the defendant, the court modified several provisions of the February 12 decision and scheduled a hearing on the issue of attorney fees. Counsel then informed the court they had resolved the fee issue, so the hearing was canceled. No party has requested additional rulings.

On April 13, 1998, Clarence Murphy filed a series of motions, including a motion to intervene, a motion to dismiss this case for lack of subject matter jurisdiction, and a motion for leave to file a brief in excess of fifteen pages.

The court allows the motion to file an overlength brief.

The court denies the motion to intervene.

The court denies other motions Clarence Murphy has filed; they are moot.

Federal Rule of Civil Procedure 24 allows a party to

intervene upon "timely application" when the applicant claims an interest relating to the suit and the suit's disposition may impair the applicant's ability to protect that interest. Courts generally disfavor intervention after entry of judgment because it "tends to foster delay and to prejudice adjudication of the rights of the original parties." **6 Moore's Federal Practice, §24.24[3]** (***Matthew Bender** 3d edition*). The United States Court of Appeals for the Eleventh Circuit has articulated a "timeliness analysis" in considering motions to intervene. See ***Meek v. Metropolitan Dade Co.***, 985 F.2d 1471, 1478-79 (11TH Cir. 1993) (factors to be considered include the length of time the applicant knew of his interest in the case before petitioning to intervene and the prejudice intervention would cause parties).

The court has applied those factors to applicant Murphy's application and concludes he did not timely file his motion to intervene.

In his lengthy motion and supporting memorandum, Murphy has not provided good cause why he waited until after judgment to move to intervene. He plainly had notice of the lawsuit; indeed he testified before the defendant's City Council as an owner of the property adjacent to the building site where the plaintiff Planned Parenthood intends to construct its clinic. Murphy really offers no tenable reason why he waited until after final judgment to seek to intervene in this case. Moreover, Murphy has not demonstrated that his interests would be adversely affected if his motion to intervene is denied. He has not demonstrated that the defendant failed to protect his interests satisfactorily, nor that this court lacked jurisdiction to hear and decide the issues in this lawsuit. He has cited no controlling constitutional provision, statute, or case law supporting his motion to enter this lawsuit after judgment was entered.

This motion to intervene should be viewed against the backdrop of an earlier lawsuit this plaintiff filed against the Director of the Iowa Health Department. ***Planned Parenthood of Greater Iowa v. Atchison***, 126 F.3d 1042 (8TH Cir. 1997). Murphy here even contends that the Court of Appeals

"wrongfully decided" that case, arguing the case should have been decided by Iowa and not federal courts. The United States Court of Appeals for the Eighth Circuit affirmed this court's decision that defendant Atchison, acting on behalf of the State of Iowa, had violated the United State Constitution in requiring the plaintiff to seek a certificate of need before constructing its medical facility in eastern Iowa. The plaintiff has already fought successfully to prevent the State and City of Bettendorf from preventing its construction and operation of a medical clinic. Unfair prejudice to the plaintiff would result from the late intervention and continued litigation Clarence Murphy proposes in his motion.

The motion to intervene is denied.

All other motions are denied as moot.

IT IS SO ORDERED.

Dated this 21ST day of April, 1998.

/s/

CHARLES R. WOLLE, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

FILED
DES MOINES, IOWA

98 MAY 11 PM 3:57

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

PLANNED PARENTHOOD OF GREATER IOWA, INC.,	)	
Plaintiff,	)	
vs.	)	**NO. 3-97-CV-80056**
THE CITY OF BETTENDORF, IOWA,	)	**ORDER**
Defendant.	)	

On April 30, 1998 Clarence Murphy filed a motion to dismiss, a motion to reconsider findings of fact and order filed April 21, 1998, and supporting documents.

The court has considered the filings. The motions are denied for several reasons.

First, Clarence Murphy is not a party. His motion to intervene was much too late, filed after this case had been tried and concluded. Murphy presents no excuse for his tardy request.

Secondly, this court had jurisdiction of the parties and subject matter. ***Plough v. West Des Moines Community School Distr.***, 70 F.3d 512 (8TH Cir. 1995), relied on by Murphy, is inapposite. Here, unlike the ***Plough*** case, no agency like the Iowa State Board of Education made factfindings while acting in a judicial capacity. The plaintiff here had no full and fair opportunity to present its issues to a judicial body before filing its complaint in this court.

Finally, I find no merit in Murphy's request that the court apply an abstention doctrine. I previously rejected defendant's request that I abstain from hearing and deciding

issues framed by the pleadings.

Murphy's motions are denied.

IT IS SO ORDERED.

Dated this 11 day of May, 1998.

/s/

CHARLES R. WOLLE, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

FILED
DES MOINES, IOWA
98 JUN-1 PM 4:45
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

PLANNED PARENTHOOD OF GREATER IOWA, INC.,

Plaintiff,

vs.

THE CITY OF BETTENDORF, IOWA,

Defendant.

NO. 3-97-CV-80056

ORDER

On May 22, 1998, Clarence Murphy filed a document captioned "renewed request for oral argument pursuant to Local Rule 14(c) and good cause shown on issues of intervention, res judicata and lack of subject matter jurisdiction".

The request is denied.

IT IS SO ORDERED.

Dated this 1ST day of June, 1998.

/s/
CHARLES R. WOLLE, JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-2496SID

Planned Parenthood, of Greater Iowa, Inc.,	*	
Appellee,	*	Appeal from the United States District Court for the Southern District of Iowa
v.	*	
City of Bettendorf, IA;	*	
Defendant,	*	
Clarence Murphy, Moving Party is an adjoining property owner of a twelve-plex apartment known as 2655 Tech Drive, Bettendorf, IA,	*	
Appellant	*	
No. 98-2825	*	
In Re: Clarence Murphy, Moving Party is an adjoining property owner of a twelve-plex apartment known as 2655 Tech Drive, Bettendorf, IA,	*	
Petitioner.	*	

JUDGMENT

The petition for writ of mandamus in No. 98-2825 is

denied. The judgment of the district court in No. 98-2496 is summarily affirmed.

July 23, 1998

Order Entered at the Direction of the Court

/s/
Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-2825SID

In re:	*	
	*	
Clarence Murphy, Moving Party is an adjoining property owner of a twelve-plex apartment know as 2655 Tech Drive, Bettendorf, IA,	*	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc
	*	
	*	
	*	
	*	
	*	
Petitioner.	*	
	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

October 2, 1998

Order Entered at the Direction of the Court

/s/
Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-2496SID

Planned Parenthood, of Greater Iowa, Inc.,	*	
Appellee,	*	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc
v.	*	
Clarence Murphy,	*	
Appellant.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

October 7, 1998

Order Entered at the Direction of the Court

/s/
Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

December 21, 1998

Mr. James J. Clancy
9055 La Tuna Canyon Road
La Tuna Canyon, CA 91352-2221

Re: In Re Clarence Murphy
Application No. A-501

Dear Mr. Clancy:

The application for an extension of time within which to file a petition for a writ of certiorari in the above entitled case has been presented to Justice Thomas, who on December 21, 1998, extended the time to and including January 28, 1999.

This letter has been sent to those designated on the attached notification list.

Sincerely,
William K. Suter, Clerk
By /s/
Loretta S. Ruffin
Assistant Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

NOTIFICATION LIST

Mr. James J. Clancy
9055 La Tuna Canyon Road
La Tuna Canyon, CA 91352-2221

Mr. William R. Stengel Jr.
305 First National Bank
100 Seventeenth Street
Rock Island, IL 61201-8751

Mr. Alan S. Gilbert
8000 Sears Tower
Chicago, IL 60606-6406

Mr. Roger K. Evans
Planned Parenthood Fed. of Am.
810 Seventh Avenue
New York, NY 10019

Clerk
United States Court of Appeals for
the Eighth Circuit
511 U.S. Court & Customs House
1114 Market Street
St. Louis, MO 63101

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

December 31, 1998

Mr. James J. Clancy
9055 La Tuna Canyon Road
La Tuna Canyon, CA 91352-2221

Re: Clarence Murphy
v. Planned Parenthood of Greater Iowa, Inc.
Application No. A-502

Dear Mr. Clancy:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Thomas, who on December 31, 1998, extended the time to and including January 29, 1999.

This letter has been sent to those designated on the attached notification list.

Sincerely,
William K. Suter, Clerk
By /s/
Loretta S. Ruffin
Assistant Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

NOTIFICATION LIST

Mr. James J. Clancy
9055 La Tuna Canyon Road
La Tuna Canyon, CA 91352-2221

Mr. William R. Stengel Jr.
305 First National Bank
100 17th Street
Rock Island, IL 61201-8751

Mr. Alan S. Gilbert
8000 Sears Tower
Chicago, IL 60606-6406

Mr. Roger K. Evans
810 Seventh Avenue
New York, NY 10019

Clerk
United States Court of Appeals for
the Eighth Circuit
511 U.S. Court & Customs House
1114 Market Street
St. Louis, MO 63101

APPENDIX B

RE MOTION TO RECUSE JUDGE WOLLE

(Reference: *Petition for Writ of Mandamus* at page 4)

MOTION OF THE CITY OF BETTENDORF TO RECUSE JUDGE WOLLE IN *PLANNED PARENTHOOD, ETC. V. CITY OF BETTENDORF, ANN HUTCHINSON, MAYOR OF BETTENDORF, ETC.*, NO. 3-96-CV-80184 (RE 90 DAY MORATORIUM PERIOD), FILED DECEMBER 6, 1996., ... B-1

RESPONSE OF PLAINTIFF PLANNED PARENTHOOD TO MOTION OF THE CITY OF BETTENDORF TO RECUSE JUDGE WOLLE IN *PLANNED PARENTHOOD, ETC. V. CITY OF BETTENDORF, ANN HUTCHINSON, MAYOR OF BETTENDORF, ETC.*, NO. 3-96-CV-80184 (RE 90 DAY MORATORIUM PERIOD)., ... B-3

ORDER OF U.S. DISTRICT JUDGE CHARLES R. WOLLE, DENYING THE MOTION OF THE CITY OF BETTENDORF TO RECUSE JUDGE WOLLE IN *PLANNED PARENTHOOD, ETC. V. CITY OF BETTENDORF, ANN HUTCHINSON, MAYOR OF BETTENDORF, ETC.*, NO. 3-96-CV-80184 (RE 90 DAY MORATORIUM PERIOD), FILED DECEMBER 9, 1996., .. B-1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

FILED
DAVENPORT, IOWA

96 DEC -6 PM 2:27

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

Planned Parenthood of Greater Iowa, Inc.	)	
Plaintiff	)	
vs.	)	
The City of Bettendorf	)	**No. 3-96-CV-80184**
Ann Hutchinson, Mayor of Bettendorf	)	**Motion to Recuse**
Defendants	)	

COMES NOW the Defendants and move to recuse Judge Wolle from the pending lawsuit and in support whereof states:

1. That Judge Wolle forthrightly and of his own volition voluntarily disclosed to the parties that his wife had in the past made a donation to Planned Parenthood ($50.00).
2. That Judge Wolle forthrightly and of his own volition voluntarily disclosed to the parties that he had purchased books at a Planned Parenthood used book sale.
3. That in this case, involving as it does constitutional issues of women's rights and protection of the public is being extensively reported in the media.
4. That under such circumstances it behooves the parties and the Court not to have even the shadow of a doubt about impartiality of the Court.

WHEREFORE, it is prayed that Judge Wolle be recused, and the matters of this litigation be heard by another Judge of

the District.

Respectfully submitted,
City of Bettendorf
Ann Hutchinson, Mayor

/s/
Gregory S. Jager
City Attorney
1609 State Street
Bettendorf, Iowa 52722
319/344-4000

/s/
Paul L. Macek
Assistant City Attorney
111 E Third Street
Davenport, Iowa 52801
319/324-1971

Attorneys for Defendants

UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

PLANNED PARENTHOOD OF GREATER IOWA, INC.,	)	
Plaintiff	)	
against	)	**No. 3-96-CV-80184**
THE CITY OF BETTENDORF, IOWA, and **ANN HUTCHINSON,** in her capacity as the Mayor of the City of Bettendorf, Iowa	)	
Defendants	)	

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO RECUSE

Plaintiff responds to defendant's motion to recuse as follows:

1. Chief Justice Rhenquist has admonished that the duty of a federal judge to preside where there is no basis for disqualification is "equally as strong," as the duty to recuse where there is a basis for disqualification. ***Laird v. Tatum***, 93 S.Ct. 7, 15 (1972).

2. Plaintiff's counsel are aware of no authority, and defendants have cited none, for the proposition that a judge's patronage of a business/fund-raising event sponsored by a party forms a reasonable basis for questioning a judge's impartiality.

3. Nor are plaintiff's counsel award of authority for the proposition that spouse's charitable donations form a reasonable basis for questioning a judge's impartiality. Again, defendants cite none.

4. There is, however, authority that a judge's charitable donations to a university are not a reasonable basis for questioning his impartiality when the university is a party before the court. ***Lunde v. Helms***, 29 F.3d 367 (8TH Cir. 1994), ***Wu v. Thomas***, 996 F.2d 271 (11TH Cir. 1993).

5. Accordingly, plaintiff submits that defendants' motion should be denied.

Respectfully Submitted,

William Stengel
Michele R. McCann
Coyle, Gilman, and Stengel
305 First of America Bank Bld'g.
Rock Island, Illinois 61201
(309) 788-0471

Roger K. Evans
Dara Klassel
Legal Action for Reproductive Rights
Planned Parenthood Federation of America
810 Seventh Ave.
New York, New York 10019
(212) 541-7800

Alan S. Gilbert
David E. Lieberman
Sonnenchein Nath & Rosenthal
8000 Sears Tower
Chicago, Illinois 60606-6404
(312) 876-8000

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

FILED
DES MOINES, IOWA

96 DEC-9 PM 4:59

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

PLANNED PARENTHOOD OF GREATER IOWA, INC.,

Plaintiff,

vs.

THE CITY OF BETTENDORF, IOWA, and **ANN HUTCHINSON,** in her capacity as the Mayor of the Mayor of the City of Bettendorf, Iowa,

Defendants.

NO. 3-96-CV-80184

ORDER

On this date the court held a hearing on the plaintiff's request for preliminary injunctive relief.

At the outset of the hearing, I received arguments on defendants' resisted motion to have me recuse. I denied the motion for the reasons stated on the record.

At 11:50 a.m. on Tuesday, December 10, 1996, I will hold a telephone conference with counsel to discuss scheduling of trial on the plaintiff's request for permanent injunctive relief. I will place the call to counsel.

IT IS SO ORDERED.

Dated this 9TH day of December, 1996.

/s/
CHARLES R. WOLLE, JUDGE
UNITED STATES DISTRICT COURT